COLD STORAGE (M) BHD.

v.

PEMUNGUT DUTI SETEM

SUPREME COURT, KUALA LUMPUR
LEE HUN HOE CJ (BORNEO)
GEORGE SEAH SCJ
SYED AGIL SCJ
[CIVIL APPEAL NO. 23 OF 1987]
2 FEBRUARY 1988

REVENUE LAW: *Stamp Duty - Case Stated from Collector of Stamp Duties - Scheme of "reconstruction and amalgamation" - Section 15(1) Stamp Duty Ordinance 1949 - Requirements to be fulfilled - Relief from payment - Whether appellant entitled to relief from stamp duty under s. 15(1) of said Ordinance - Procedure of appeal from decision of Collector.*

This was an appeal which concerned the question whether the appellant was entitled to relief from stamp duty under s. 15(1) of the Stamp Duty Ordinance 1949 ("the Ordinance") in respect of a scheme of "reconstruction and amalgamation" carried out in 1964.

Held:

[1] In order to be entitled to relief under s. 15 of the Ordinance, all the conditions imposed by that Section must be fulfilled, namely:

(i) The Collector of Stamp Duties must be satisfied;

(ii) He must be satisfied that the instrument for which relief is to be given is in connection with a scheme for reconstruction or amalgamation;

(iii) The consideration for acquisition consists of not less than 90% of shares in exchange for shares.

[2] The learned Judge was therefore perfectly right to hold that all the conditions of s. 15 must be complied with if a company were to be entitled to relief under that Section.

[3] Application for relief from payment of Stamp Duty must be in connection with a scheme for reconstruction or amalgamation. A scheme for reconstruction of a company under s. 15(1) of the Ordinance requires the fulfilment of three conditions, namely:

(i) there must be a transfer of undertaking of an existing company to a new company;

(ii) substantially the same persons who were members of the existing company should be members of the new company;

(iii) the new company must carry on substantially the same business as the business transferred to it.

[4] Having heard the parties and perused the record of appeal, the learned Judge has not gone out of the ambit of the statement of case as presented and argued before him.

[Appeal dismissed with costs. Deposit to respondent on account of taxed costs.]

Cases referred to:
Brooklands Selangor Holdings Ltd. v. Inland Revenue Commissioners [1970] 2 All ER 76
Baytrust Holdings Ltd. v. Inland Revenue Commissioners [1971] 3 All ER 76
Crane Fruehauf Ltd. v. IRC [1975] 1 All ER 429
Cheong Yok Choy & Anor. v. The Collector of Stamp Duties, Kuala Lumpur [1950] 16 MLJ 276

Legislation referred to:
Finance Act 1927 [UK], s. 55, (1)
Stamp Ordinance 1949, s. 15, (1), (1)(c), (1)(c)(iii)

For the appellant - Chan Huah Eng; M/s. Shearn Delamore & Co.
For the respondent - Abdul Hamid bin Haji Mohamed, SFC

JUDGMENT

Lee Hun Hoe CJ (Borneo):

This appeal is concerned with the question whether the appellant is entitled to relief from stamp duty under s. 15(1) of the Stamp Ordinance 1949 in respect of a scheme of "reconstruction and amalgamation" carried out in 1984.

The facts were set out in great detail by the learned Judge. Cold Storage Holding PLC (PLC) is a company incorporated in England and originally held 100% of Cold Storage (Malaysia) Bhd. (i.e., the appellant) and Fima Supermarkets Malaysia Berhad (FSMB). Both the appellant and FSMB were incorporated in Malaysia. The appellant had an authorised capital of RM40,000,000 divided into 40 million ordinary shares of RM1 each of which 25,000,000 ordinary shares had been issued and were fully paid up. FSMB had an authorised capital of RM30,000,000 divided into 30 million ordinary shares of RM1 each of which 24,000,000 ordinary shares had been issued and were fully paid up.

In 1980 in response to the New Economic Policy (NEP) of the Government of Malaysia PLC reduced its holding to:

(a) 70% in the case of FSMB (30% being sold to Kumpulan Fima);

(b) 65% in the appellant.

In giving approval to PLC to divest, the Foreign Investment Committee (FIC) imposed a condition that PLC should divest itself of a further 5% of the appellant to Bumiputra within two years.

In 1984 PLC decided to go beyond the FIC requirement and reduce its holdings to a greater extent so that it became a minority shareholder from its position as a majority shareholder. It proposed a scheme to the authorities that it should restructure the appellant and FSMB in such a way that all Malaysian participation would be concentrated in one company, i.e., the appellant. This would tidy up equity holdings in the group. The proposal involved two stages. First, the appellant would take over all the issued share capital of FSMB from PLC and Kumpulan Fima in exchange for shares in the appellant with no cash element. The result is that Kumpulan Fima, instead of being a shareholder of FSMB, became a shareholder of the appellant and FSMB became the wholly-owned subsidiary of the appellant. Secondly, the issue of shares of the appellant was followed immediately by the sale of shares for cash by PLC of approximately 25% and by Kumpulan Fima of approximately 4.6% of the enlarged issued share capital of the appellant to Pradaz Sdn. Bhd. (Pradaz), a wholly-owned Bumiputra company. The effect of these arrangements is that the equity distribution of the shares in the appellant will be as follows:

42.5% by PLC;

29.64% by Pradaz;

10% by Kumpulan Fima;

17.86% by others.

In implementing the reconstruction scheme various documents were executed by the parties concerned. We need only refer to two agreements for the purpose of this appeal. By an agreement dated 28 January 1984 Kumpulan Fima Bhd (FIMA) and PLC agreed to sell their holdings comprising 100% of the issued share capital of FSMB in exchange for 24,000,000 shares of the appellant subject, *inter alia*, to the approval of FIC.

By an agreement dated 13 April 1984 PLC agreed to sell shares in the appellant to Pradaz conditional, *inter alia*, upon the agreement dated 28 January 1984 being effected and the approval of FIC.

The proposal was presented as a package for approval of and which was approved by the FIC as well as the Capital Issues Committee (CIC).

Following upon the approvals of FIC and CIC, the transfers relating to the 24,000,000 shares of FSMB was submitted to the respondent for adjudication. By his letter dated 9 May 1985 the respondent assessed stamp duty on the said transfers at RM201,960. The said letter reads:

> Dear Sir,
>
> Re: Amalgamation of Fima Supermarkets Malaysia Berhad with Cold Storage Malaysia Berhad
>
> Thank you for your letter of 11 April 1985 and enclosures. Those show that both companies had earlier restructured within the New Economic Policy goals and that the amalgamation would not directly result in any change in the existing ratios of equity ownership of Cold Storage. The changes in equity ownership, it will be noted, was effected by a separate contract arrangement and against consideration in cash. This scheme of amalgamation cannot therefore be considered to have been undertaken 'in compliance with Government policy on capital participation in industry ...' (amendment to s. 15(1) by Act 293 of 1983). I regret to state therefore that your application for reliefs cannot be recommended to the Collector for consideration. Accordingly I assess duty payable on the instruments of transfer at RM201,960 calculated on the value of the consideration for transfer being RM67,320,000. Please arrange remittance of this sum within the next 14 days.
>
> 'Berkhidmat Untuk Negara'
>
> Saya yang menurut perintah,
>
> (E.J. Lopez)
> b/p Pemungut Duti Setem,
> Bahagian Duti Setem,
> Hasil Dalam Negeri,
> Kuala Lumpur.

It is the contention of the appellant that the Collector rejected the application for relief solely on the grounds that the amalgamation was no "in compliance with Government policy on capital participation in industry ..." On this matter the appellant pointed out that the learned Judge decided in his favour. He was under the impression that that was the only ground for rejection. If the cash consideration was a material factor in his decision the Collector would have so stated as one of his grounds and not merely as one of the factors taken into account in reaching his decision. He said that he was taken by surprise when Encik Abdul Hamid for the respondent raised the point of cash consideration.

In the Court below, Encik Abdul Hamid pointed out that the consideration for the sale of shares by the appellant to Pradaz was for cash. He then submitted that if the consideration was cash then s. 15(1)(c)(ii) did not apply. Even if the acquisition by Pradaz was part and parcel of the scheme, it would still attract duty because the consideration was cash.

At p. 8 of the Appeal Record the learned Judge, after analysing the exchange of shares stated:

> The reconstruction scheme was implemented. The appellant applied for exemption from stamp duty in respect of the sale of shares to Pradaz...

According to the appellant the learned Judge was clearly wrong to say so.

The appellant referred to another part of the judgment at pp. 10 and 11 of the Appeal Record where the learned Judge said:

> ... Although the divestment of Cold Storage Malaysia shares to Pradaz Sdn. Bhd. was in compliance with Government policy on capital participation in industry under s. 15(1), it must also satisfy the condition under sub-section (1)(c) which reads:
>
> that the consideration for the acquisition (except such part thereof as consists in the transfer to or discharge by the transferee company of liabilities of the existing company) consists as to not less than ninety per centum thereof:
>
> (i) -
>
> (ii) where shares are to be acquired, in the issue of shares in the transferee company to the holders of shares in the existing company in exchange for the shares held by them in the existing company.

The learned Judge went on to say:

> Here as far as the transfer of shares to Pradaz Sdn. Bhd. is concerned, there was no exchange of shares but a sale of shares for cash and accordingly the condition has not been satisfied to entitle exemption from payment of duty. For this reason I find that the Collector of Stamp Duty is correct in holding that stamp duty is chargeable in this instance.

It is the contention of the appellant that from his finding and statement the learned Judge had gone out of the ambit of the statement of case or case stated which was concerned only with the submission of the first part of the scheme, that is to say, the transfer of 100% of the issued share capital of FSMB. The respondent pointed out that the second part of the scheme was raised in the statement of case or case stated. The learned Judge had, therefore, not gone out of the ambit of the statement of case or case stated. At p. 9 of the Appeal Record the learned Judge said:

> ... As is evident from the facts of this case, reconstructing of companies cannot be accomplished in a single step a embodied in a single document. It takes several steps and many documents. I am satisfied that the events commencing from 28 January 1984 until the final sale of shares to Pradaz Sdn. Bhd. constitute one scheme of reconstruction. Even if that were so, it is urged that reconstruction to accord with the New Economic Policy had already been accomplished in 1980. Hence the argument of no real change in the existing ratios of equity ownership in the 1984 exercise. It may well be, following the events of 1980 that the English Company immediately nurtured a scheme to increase Malaysian equity participation which came to fruition in 1984 and therefore the reconstructing scheme in fact commenced in 1980 and was completed in 1984 ...

Summarising his case the appellant submitted that the learned Judge had in fact found in his favour on the first issue which turned on the expression "in compliance with Government policy on capital participation in industry" and on the second issue in relation to the

consideration for shares in the appellant being paid by Pradaz, the learned Judge had misdirected himself and was, therefore, wrong in deciding to dismiss his appeal. He urged this Court to allow the appeal.

Having dealt with the relevant provision of s. 15 of the Stamp Ordinance 1949 and the amendment by inclusion of the words "the scheme is in compliance with Government policy on capital participation in industry and" the learned Judge expressed his views at p. 5 thus (see Part A of Appeal Record):

> ... In my judgment the effect of the amendment is that with effect from 1 January 1984 compliance with Government policy on capital participation in industry is a **condition precedent** to the grant of relief from stamp duty in case of reconstructions or amalgamations of companies. It follows that since 1984, reconstruction and amalgamation of companies which do not comply with Government policy on capital participation in industry are no longer entitled to exemption from stamp duty as they had been prior to 1984. But is does not follow that merely because the scheme is in compliance with Government policy on capital participation in industry it is entitled to exemption from stamp duty because, with the use of the word **'and'** at the end of the amendment, all the other conditions of s. 15 must also be complied with.

We agree with the views of the learned Judge on this. To be entitled to relief under s. 15 all the conditions imposed by that section must be fulfilled. For the purpose of this appeal the following conditions must be fulfilled:

1) The Collector of Stamp Duties must be satisfied;

2) He must be satisfied that the instrument for which relief is to be given is in connection with a scheme for reconstruction or amalgamation;

3) The consideration for acquisition consists of not less than 90% of shares in exchange for shares.

The learned Judge was, therefore, perfectly right to hold that all the conditions of s. 15 must be complied with if a company were to be entitled to relief under that section. As stated earlier the learned Judge found that because of the sale of shares in the appellant to Pradaz was for cash he held that the condition was not satisfied to entitle appellant for exemption of payment of duty. The appellant said the learned Judge had misdirected himself and was, therefore wrong. On the other hand, the respondent submitted the learned Judge was right in holding that the provisions of s. 15(1)(c) was not satisfied because the considerations was cash.

If we were to take away the second part of the scheme, leaving only the first part of the scheme it becomes quite clear that there was no compliance with Government policy in capital participation in industry because it was the second part that brings in the Bumiputra shareholders into the scheme.

The objectives of the New Economic Policy is to restructure the capital sector in Malaysia so that by 1990 the equity distribution will be in the proportion of 30% Bumiputra, 40% Non-Bumiputra and 30% Foreigners. It is said that the non-Bumiputra and foreigners had long exceeded the 40% and 30% target respectively. The problem is how to increase the Bumiputra equity participation to 30% by 1990. One way is for more Bumiputra to go into commerce and to work hard in whatever they undertake. Another way is for existing Bumiputra companies to acquire shares in non-Bumiputra or Foreign Companies. In this exercise so long as provisions of the Stamp Ordinance are complied with relief from payment of stamp duty

may be granted. It must be made clear that the relief from payment of stamp duty is not a bonus to a company for disposing its shares to Bumiputra. Rather, it is for bringing itself with the NEP.

The question whether a company is entitled to relief from stamp duty any number of times it obtains approval from the CIC after reference to FIC is not in issue in this appeal and we would make no comment without hearing full arguments on the matter. One thing is, however, clear. The question of relief is a matter for the Collector of Stamp Duties. Under s. 15(1) in the case of reconstruction or amalgamation of any companies the relief from stamp duty can only be granted if it is shown to the satisfaction of the Collector of Stamp Duties. It is the Collector of Stamp Duties who must be satisfied and not anybody else. That responsibility is his and his alone. If he decides rightly the Court will support him. But, if he makes the wrong decision then the Court will have to interfere to put the matter right. Application for relief from payment of stamp duty must be in connection with a scheme for reconstruction or amalgamation. Prior to the amendment of the Malaya Stamp Ordinance 1945 s. 15 was in *para materia* with s. 55 of the English Finance Act 1927. The relevant provision of s. 55(1) reads:

> If in connection with a scheme for the reconstruction of any company or companies or the amalgamation of any companies it is shown to the satisfaction of the Commissioners of Inland Revenue that there exist the following conditions, that is to say:
>
> (a) . . .
>
> (b) . . .
>
> (c) that the consideration for the acquisition . . . consists as to not less than ninety per cent thereof
>
> (i) . . .
>
> (ii) where shares are to be acquired, in the issue of shares in the transferee company to the holders of shares in the existing company in exchange for the shares held by them in the existing company; ...

The words "a scheme for the reconstruction or amalgamation" have been judicially considered in a number of English cases.

The expressions "reconstruction" and "amalgamation" are not terms of art. In *Brooklands Selangor Holdings Ltd v. Inland Revenue Commissioners* [1979] 2 All ER 76 Pennycuick J held, *inter alia,* that the company was not entitled to the reliefs claimed, because (i) the word "reconstruction" in s. 55(1) of the 1927 Act denoted the transfer of the undertaking or part of the undertaking of an existing company to a new company with substantially the same persons as members of the new company as were members of the old company; (ii) the apparent purpose of s. 55 of the 1927 Act was to grant relief from duty where the underlying ownership of the undertaking transferred remained substantially unaltered; and (iii) the effect of the transaction in question was that the holders of stocks in the taxpayer company were most substantially different from holders of stock in BSR in that they consisted of approximately half only in value, though the vast majority in number, of the holders of stock in BSR. In the case of *Baytrust Holdings Ltd v. Inland Revenue Commissioners* [1971] 3 All ER 76. Plowman J held *inter alia,* that all the claims to relief from stamp duty failed because (i) the scheme was not a scheme of "reconstruction" within s. 55 of the 1927 Act; the reconstruction of a company normally involved the transfer of a company's undertaking (or part of it) to a new company which was going to carry on substantially the same business

as the business transferred to it; ... the business to be carried on by the new company was not the business previously carried on by F & B Ltd; (ii) on the true construction of s. 55 the provisions of s. 55(1) were limited to cases where the shares in the transferee company were issued to the existing company as beneficial owner.

A scheme for reconstruction of a company under the English s. 55(1) requires the fulfilment of three conditions. The same requirements apply to our s. 15(1). The three conditions are:

1) there must be a transfer of undertaking of an existing company to a new company;

2) substantially the same persons who were members of the existing company should be members of the new company;

3) the new company must carry on substantially the same business as the business transferred to it.

The meaning of the words "scheme for the amalgamation of any companies" was considered in the leading case of *Crane Fruehauf Ltd v. IPC* [1975] 1 All ER 429. Stamp LJ said at p. 435 of his judgment that an amalgamation consisted for the purpose of s. 55 of the combining of the businesses of more than one company in such a way that the businesses remained in substance owned by the same persons. This result may be achieved in two classes of case:

a) by a transaction whereunder the business of an existing company is acquired by another company (the transferee company) in return for an issue of shares in the transferee company to the transferor company or to its shareholders;

b) by the acquisition by the transferee company of shares of the existing company in exchange for shares in the transferee company issued to the shareholders of the existing company.

As Scarman LJ observed at p. 437 that "amalgamation" was frequently used to describe a merging of the undertakings of two or more companies into one undertaking.

As stated the scheme consists of two parts:

1) The sale of FSMB shares by PLC and FIMA to the appellant. The consideration is the allotment and issue of 24,000,000 ordinary shares of RM1 each in the appellant in the proportion of 16,800,000 to PLC and 7,200,000 to FIMA.

2) The sale of PLC of its shares in the appellant to Pradaz for cash.

The agreement between PLC and FIMA on the one part and the appellant on the other part was clearly a scheme for amalgamation notwithstanding that PLC's holding in the appellant was reduced and the sale of PLC's shares to Pradaz. The claim for relief failed because the consideration was not simply the issue of shares but the issue of shares subject to an obligation imposed as part of the general arrangement to transfer certain shares to another company for cash.

The Collector would seem to treat the two parts separately. Although he accepted the first part to have satisfied the conditions of an amalgamation he did not consider the second part to qualify as a reconstruction or amalgamation. He simply regarded the second part as an outright sale of shares in the appellant by PLC to Pradaz for cash.

There is some force in the respondent's contention that though the first part passes the test of an amalgamation it fails to comply with Government policy on capital participation in industry as it does not result in the increase of Bumiputra equity participation. As regards

the second part, though it passes the test of compliance with Government policy on capital participation in industry in that it results in the increase of Bumiputra equity participation it fails to satisfy the test of either reconstruction or amalgamation. It further fails because the consideration is for cash and not at least 90% in exchange of shares.

After referring to the various conditions which must be shown to the satisfaction of the Commissioners of Inland Revenue, *Halsbury's Laws of England*, 4th Edn., Vol. 7, p. 886, para. 1556 on the statutory conditions for relief from stamp duty concluded that:

> The conditions are only satisfied by an acquisition for shares simpliciter and not by an acquisition for shares subject to a contract to sell or an option to purchase imposed by the transferee company as a condition of the acquisition.

Crane Fruehauf's case (*supra*) was cited for the above proposition. In that case the scheme for amalgamation consisting of an acquisition of shares for shares plus cash was held to retain its character as such notwithstanding that the vendor shareholders were obliged under the overall scheme to sell one-third of the consideration shares issued to them thereby destroying the substantial identity of ownership. The Court of Appeal upheld the decision of Templeman J, in that case that the claim for relief failed because the consideration was not simply the issue of shares but the issue of shares subject to an obligation imposed as part of the general arrangement to transfer them to another company for cash should the company exercise an option to acquire them.

It must be pointed out that the position taken by the appellant is that the whole exercise including the sale by PLC of its shares in the appellant to Pradaz for cash is part and parcel of one scheme of reconstruction or amalgamation. Having heard the parties and perused the record of appeal we do not consider that the learned Judge has gone out of the ambit of the statement of case as presented and argued before him. For reasons given we would dismiss the appeal with costs. Deposit to respondent on account of taxed costs.

There is one other matter which, although not directly related to this appeal, has been brought to our attention. That is the question of procedure to be followed generally in an appeal from the Collector. First, we must remember the Collector of Stamp Duties is merely a civil servant and not legally qualified like an officer of the Judicial and Legal Service. He may have difficulty in drafting a case stated without legal assistance. If one has occasion to see a case stated in an income tax appeal then one would realise its technicality. But then the Chairman of the Special Commissioners of Income Tax has always been a legally qualified person of some seniority. Taylor J in *Cheong Yok Choy & Anor. v. The Collector of Stamp Duties, Kuala Lumpur* [1950] 16 MLJ 276 stated:

> ... The general practice is for the appellants' legal advisers to make the first draft of the case and send it to the respondent's advisers for their consideration, after which it is submitted to the presiding officer who alone can settle accurately that part of the document which expresses his findings of fact and his opinion on the points requiring decision. It may be necessary for the parties to attend before the tribunal for final revision of the draft. The essence of a case stated is a joint statement by all three of the facts and of the outstanding issues, so that the appellate Court has the whole matter before it in the most concise form...

The reason is an valid today as it was thirty-seven years ago.

On the question of filing of the Notice of Appeal with the Collector, we think Harun J's suggestion is, as admitted by the respondent's Counsel, administratively sound and convenient. The Collector will then know his decision is under appeal.

Since there is a conflict of views expressed by the two Judges on the question of procedure relating to an appeal from the Collector to the High Court, we consider that this matter should be referred to the respective Chief Justice of the High Court to be dealt with by means of a Practice Note as to the most suitable procedure to be followed. This is important because Sabah and Sarawak have their own Stamp Ordinances.

Also found at [1988] 1 CLJ 464